

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.H., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL  
FACILITIES, Pearl City, HI, Employer**

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**Docket No. 16-1824  
Issued: June 2, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 15, 2016 appellant filed a timely appeal from a March 31, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established a recurrence of disability commencing July 10, 2015 due to the accepted September 2, 2014 employment injury.

**FACTUAL HISTORY**

On September 9, 2014 appellant, then a 40-year-old waste water treatment plant operator, filed a traumatic injury claim (Form CA-1) alleging that he felt sharp pain in his lower back on September 2, 2014 while moving a metal locker onto a truck. On November 4, 2014 OWCP

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

accepted his claim for lumbar sprain. Appellant stopped work on September 2, 2014, but returned to limited duty with restrictions on November 12, 2014.

On December 29, 2014 appellant filed claims for compensation CA-7 forms for intermittent leave without pay for November 21, 2014, from November 24 through November 26, 2014, on November 28, 2014, from December 1 through December 5, 2014, and from December 8, 2014 through 9, 2014. He submitted a note dated December 8, 2014 from Dr. Daniel W. Wu, a Board-certified internist, in which he stated that appellant was under his professional care and was unable to perform his duties from November 25 through December 9, 2014.

By letter dated January 9, 2015, OWCP notified appellant that, although he had filed claims for compensation, it believed that the case would more appropriately be handled as a recurrence of disability, as it appeared that disability was due to a material change or worsening of the accepted work condition. OWCP advised appellant that he had not submitted sufficient evidence to establish a recurrence of disability commencing November 21, 2014. It noted that appellant had returned to work on November 18, 2014 in a full-time light-duty capacity, and continued working until November 21, 2014 when he stopped work. OWCP requested that appellant submit a narrative medical report from his physician, and afforded appellant 30 days to submit the requested information.

On January 30, 2015 appellant filed additional claims for compensation (Form CA-7) for intermittent leave without pay due to physical therapy on January 8, 12, 13, 15, and 23, 2015 and for leave without pay due to visits to a physician on January 2 and 16, 2015. For each of these dates, appellant claimed eight hours of compensation.

By note dated January 2, 2015, Dr. Craig stated that appellant could return to work on that date with restrictions of no lifting, pulling, bending, climbing, squatting, kneeling, or use of tools.

By letter dated February 6, 2015, OWCP informed appellant that it was only able to medically verify the claimed dates of January 2, 8, and 12, 2015. It further noted that for these dates, appellant was entitled only to four hours of compensation for each medical appointment. OWCP declined to pay compensation for the rest of the dates claimed due to lack of medical evidence. It afforded appellant 30 days in which to submit medical evidence in support of his claims.

Appellant returned to full-time limited duty on December 9, 2014, but continued to claim wage-loss benefits for intermittent medical appointments.

By decision dated May 15, 2015, OWCP denied appellant's claimed intermittent periods of disability (recurrence) for the period November 21 through December 9, 2014 because the medical evidence was insufficient to establish disability due to the accepted lumbar sprain.

On July 31, 2015 appellant filed additional claims for compensation (Form CA-7) for eight hours of intermittent leave without pay on July 10, 2015 due to being under his physician's care, and for temporary total disability from July 12 through 25, 2015.

A report from Dr. Craig, dated July 6, 2015, released appellant to work on July 7, 2015 with limitations of no bending, no lifting of over 20 pounds, and no sitting longer than 30 minutes at a given time.

In notes dated July 10 and 20, 2015, however, Dr. Craig found appellant totally disabled and unable to return to gainful employment. By an undated letter, received on July 28, 2015, Dr. Craig noted that appellant had been put on temporary disability until further notice. He stated that, upon returning to work, appellant's therapy sessions had stopped. Dr. Craig noted that appellant complained of his pain levels worsening. He recommended that appellant return to massage and physical therapy, and that he could return to work with limitations after a period of two through four months.

By letter dated August 7, 2015, OWCP informed appellant that he had submitted insufficient evidence to establish a recurrence of disability on July 10, 2015. It noted that Dr. Craig's recommendation that appellant was temporarily totally disabled was based upon complaints of pain, and that such complaints were not sufficient in themselves to constitute objective evidence of disability. OWCP provided a questionnaire for appellant to complete and afforded appellant 30 days to submit additional evidence.

On August 12, 2015 OWCP scheduled an appointment with a diagnostic second opinion physician for a magnetic resonance imaging (MRI) scan and an electromyogram/nerve conduction study (EMG/NCV) of his lumbar spine. By letter dated August 26, 2015, it was advised that appellant failed to undergo the MRI scan because he was too claustrophobic and unwilling to be sedated. Attached to the letter was a June 23, 2015 report from Dr. Richard Y. Kimura, a Board-certified orthopedic surgeon. Dr. Kimura diagnosed appellant with lumbar radiculopathy. He stated that the objective evidence to support disability was the weakness of the right big toe and decreased sensation on the right big toe indicating the lumbar radiculopathy. Dr. Kimura further noted that appellant was in need of further physical therapy over the next three months. In attached work restrictions dated August 26, 2015, Dr. Kimura stated that appellant could return to work on light duty, with restrictions of: no twisting, bending, stopping, pushing, pulling, squatting, kneeling, or climbing; no lifting over 20 pounds; and no sitting over 35 minutes without getting up to stretch.

By decision dated September 11, 2015, OWCP denied appellant's claim for recurrence beginning July 10, 2015. It noted that, while Dr. Kimura had diagnosed appellant with "'probable' lumbar radiculopathy," there was no diagnostic testing used to establish this diagnosis. OWCP further noted that there was no objective evidence of record to indicate that appellant was temporarily totally disabled or that he was unable to work with restrictions after July 10, 2015.

On October 20, 2015 Dr. Thomas Williams, a diagnostic radiologist, examined the results of an MRI scan of appellant's lumbar spine. He noted impressions of mild degenerative changes of the lumbar spine, including a focal right central disc protrusion at T12-L1 causing narrowing of the right lateral recess.

By letter dated November 30, 2015, Dr. Craig stated that appellant sustained his injury "pushing the back end of an extremely heavy metal locker while one coworker carried left front

and another held the right front/middle onto the bed of the truck that became suddenly lodged, creating acute inertia resulting in significant damage of his lower back.” He noted that the MRI scan report contained evidence of a T12-L1 focal right central disc protrusion with narrowing of the right lateral recess, an L2-3 shallow disc bulge asymmetric to the right, and mild degenerative change of the lumbar spine. Dr. Craig diagnosed appellant with intervertebral disc disorder, stenosis of the lateral recess of the lumbar spine, and lumbar sprain.

On November 30, 2015 appellant replied to OWCP’s questionnaire. He noted that his injury was not a recurrence, as his back pain, muscle spasms, and numbness had persisted since the date of injury. Appellant stated that he returned to work for financial reasons despite the persistence of his symptoms. He continued to submit claims for compensation for temporary total disability subsequent to July 10, 2015.

In a report dated December 22, 2015, Dr. Jeffrey J.K. Lee, a Board-certified orthopedic surgeon, provided results on examination. He diagnosed right T12-L1 disc herniation and obesity. Dr. Lee noted, “The T12 [herniated nucleus pulposus] is the likely provenance of his back and right leg pain and weakness.... Since [appellant] is over [one] year post injury, it is unlikely that he will be able to return to work which requires repetitive heavy lifting or bending or twisting.”

On January 12, 2016 appellant requested reconsideration of OWCP’s September 11, 2015 decision.

By decision dated March 31, 2016, OWCP denied modification of its decision of September 11, 2015. It explained that none of the medical reports of record provided an explanation of how the T12-L1 herniation was related to the employment injury of September 2, 2014.

### **LEGAL PRECEDENT**

Where an employee, who is disabled from the job he or she held when injured due to employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>2</sup>

OWCP regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>3</sup> This term also means an inability to work that

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<sup>2</sup> *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>3</sup> 20 C.F.R. § 10.5(x).

takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>4</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.<sup>5</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>6</sup>

### ANALYSIS

OWCP accepted appellant's claim for lumbar strain on November 4, 2014. It paid for intermittent periods of disability. On July 31, 2015 appellant filed a claim for compensation commencing July 10, 2015. OWCP adjudicated appellant's claim as a claim for recurrence of disability commencing July 10, 2015, following a return to work at light duty.

The Board finds that appellant has failed to submit sufficient evidence to establish a recurrence of total disability on July 10, 2015 causally related to the September 2, 2014 employment injury.

The Board notes that appellant had been working full-time light duty since December 9, 2014. It is therefore appellant's burden of proof to establish total disability causally related to the accepted employment injury. The only physician of record who opined that appellant was totally disabled after July 10, 2015 due to the accepted injury was Dr. Craig, in a July 10, 2015 report. Yet, in a report four days prior, dated July 6, 2015, he found that appellant could return to work with limitations, in two to four months. Dr. Craig offered no explanation as to how appellant's accepted condition had worsened sufficiently in those four days to have caused total disability, other than to relate that appellant's pain levels were worsening.<sup>7</sup> Subjective complaints are insufficient to establish a recurrence of disability.<sup>8</sup> The Board further notes that Dr. Kimura and Dr. Lee both found that appellant could return to light duty.

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<sup>4</sup> *Id.*

<sup>5</sup> *Ronald A. Eldridge*, 53 ECAB 218, 221 (2001).

<sup>6</sup> *Mary A. Ceglia*, Docket No. 04-113 (issued July 22, 2004).

<sup>7</sup> *E.B.*, Docket No. 16-1468 (issued December 7, 2016).

<sup>8</sup> *See P.P.*, Docket No. 16-1232 (issued December 23, 2016).

The Board finds that the evidence of record, therefore, is insufficient to establish total disability beginning July 10, 2015 due to the accepted conditions.

Appellant has also neither alleged nor established that light-duty work was no longer available for him after July 10, 2015.<sup>9</sup>

The Board further notes that there is no medical opinion evidence of record linking the diagnoses of lumbar radiculopathy or a right T12-L1 disc herniation to the traumatic event of September 2, 2014. The only accepted condition in this case is lumbar strain.

In a June 23, 2015 report, OWCP's second opinion physician, Dr. Kimura, diagnosed lumbar radiculopathy. He stated that the evidence that supported disability was the weakness of the right big toe and decreased sensation on the right big toe indicating the lumbar radiculopathy.

In a report dated December 22, 2015, Dr. Lee diagnosed right T12-L1 disc herniation and obesity. He noted, "The T12 [herniated nucleus pulposus] is the likely provenance of his back and right leg pain and weakness.... Since he is over [one] year post injury, it is unlikely that he will be able to return to work which requires repetitive heavy lifting or bending or twisting."

OWCP's procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>10</sup>

Therefore, in order to support a claim for recurrence, appellant must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.<sup>11</sup> Because the record is devoid of such a statement of causation between his accepted injury on September 2, 2014 and the diagnosed conditions of lumbar radiculopathy and right T12-L1 disc herniation which disable him from work, appellant has not submitted sufficient evidence to support a recurrence of disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

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<sup>9</sup> See *supra* note 2.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(c)(5) (October 2009).

<sup>11</sup> *Id.*

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability commencing July 10, 2015 due to the accepted September 2, 2014 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board